Supreme Court, U.S.
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No. 85-974

In the Supreme Court of the United States

October Term, 1985

Bob Hess ..... *Petitioner*

V.

Mark Treece ..... *Respondent*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Dated: January 8, 1986

QUESTION PRESENTED

Should the Court expand the holding of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) to protect extreme and outrageous conduct that intentionally causes emotional distress.

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The respondent, Mark Treece, respectfully prays that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 386 Ark. 434, 693 S.W.2d 792 (1985) was reprinted as Appendix A to the Petition.

JURISDICTION

The respondent agrees with the jurisdiction statement contained within the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions as set forth in the petition adequately state the Constitutional provisions involved.

STATEMENT OF THE CASE

The respondent, Mark Treece, a Little Rock, Arkansas police officer filed a complaint against the petitioner, Bob Hess, in the Circuit Court of Pulaski County, Arkansas, on May 6, 1983, alleging the petitioner engaged in intentional, reckless and outrageous conduct toward the respondent resulting in severe emotional, and mental distress knowing that said conduct should cause, or would cause, emotional distess. Complaint ¶II.

Additionally the respondent alleged that the petitioner's " . . . wilfull, wanton and intentional misconduct warranted punitive damages." Complaint ¶VIII.

The respondent filed an amended Complaint adopting his original Complaint and further alleging that the petitioner had contacted Captain Daley stating that petitioner would have the respondents job at any cost and that petitioner would continue to conduct constant surveillance of the respondent; the petitioner contacted Lt. Benefield making numerous unfounded complaints concerning the respondents conduct as a police officer and had placed the respondent under constant surveillance; the petitioner contacted Lt. C.R. Watters and made numerous unfounded complaints and accused the respondent of immoral conduct. As a final allegation, the respondent alleged that the petitioner had contacted a Mary Ann Haston asking her to place the respondent under " . . . constant surveillance, to contact the respondent's wife in an effort to disrupt his marriage, and borrowed her clothing and wigs, disguising himself in surveilling the respondent so as to cause the respondent emotional distress." Amended Complaint ¶V.

The trial court instructed the jury that the respondent had to prove four propositions: that he sustained damages; that petitioner by extreme and outrageous conduct wilfully

or wantonly caused severe emotional distress to the respondent; that the conduct of the petitioner was the proximate cause of the respondents emotional distress; and that the emotional distress suffered by the respondent was so severe that no reasonable person could expect to endure it. (State trial transcript page 1018; hereafter referred as T.) The jury was also instructed that "when I use the term 'extreme and outrageous' conduct, I mean conduct that is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in civilized society." (T. 1020)

The evidence at the trial, unlike the manner in which it was characterized by the petition, did contain testimony that the petitioner knowingly made false reports concerning the respondent's official and unofficial conduct. The testimony of Mary Ann Haston was that the petitioner would make phone calls from her living room to the Police Department concerning Officer Treece which were clearly flase and that petitioner had asked her to make a false statement to the Little Rock Police Department concerning the respondent harrassing her. (T. 619, 621)

After being instructed on the tort of outrage and qualified privilege, as requested by the defendant, [1] the

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The defendant below asked for and received an instruction that provided a defendant cannot be held liable for engaging in conduct which he had legal right to. Private citizens have a legal right to complain in good faith to proper authorities about the conduct of police officers and to seek their removal from office. Further more, where a citizen has made a complaint about the conduct of a police officer, there is a presumption of good faith which the officer must overcome to make a case and the privilege includes complaints which may subsequently be found to be incorrect. (T. 1021-1022) Petitioner also obtained the benefit of the jury instruction which provided, "For any acts which may have occurred after January 1, 1983, you are instructed that the defendant is immune, that is, cannot be held liable unless plaintiff proves that defendant's conduct violated clearly established statutory or constitutional rights which a reasonable person would have known. *Harlow v. Fitzgerald*, ____ U.S. ____; 102 S.Ct. 2727, 2738 (1982). (T. 1023)

jury returned a verdict of $25,000.00 compensatory damages and $50,000.00 punitive damages.

The Arkansas Supreme Court found that petitioner's conduct clearly constituted outrageous conduct warranting the imposition of damages. (App. A. p. 6a of the Petition)

REASONS FOR DENYING THE PETITION

The case before the Court is not one of defamation as characterized in the petition, but one of intentional infliction of emotional distress. The case is factually unique and does not warrant review due to the lack of national importance.

The judgment of the Arkansas Supreme Court was correct under State law and did not violate the principle of New York Times v. Sullivan, 376 U.S. 254.

I

Under Rules (17)(1)(c) of this Court it is necessary that a case present facts of national importance. This case presents facts important to the two litigants involved and is unique to them. The Court is not being asked to apply the test of actual malice to a defamation case but is being asked to apply it to the tort of intentional inflication of emotional distress. The tort of intentional infliction of emotional distress as defined by the *Restatement of Torts*, 2d, §46, arises when "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another the subject for liability for such emotional distress, ..." The commentary to this section points out that, "liability has been found only where the conduct has been so outrageus in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Restatement of Torts* 2d, Sec. 46 (Comment (d)) the jury instructions given clearly defined the proof that respondent had to present to make this case in the terms of Sec. 46, *Restatement of Torts* and not in the terms of defamation. The Arkansas Supreme Court reviewed the sufficiency of the evidence based on the tort of intentional infliction of emotional distress and not that of defamation.

In contrast to the tort of intentional infliction of emotional distress, "(i)t is settled law that damage to

reputation is the fundamental concept of the law of defamation. The action turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation." *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933, 935 (1983).

"A Federal question raised by petitioner may be of 'a substance' in the sense that, abstractally considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues nor does it sit for the benefit of the particular litigants . . . 'special and important reasons' imply a reach to a problem beyond the academic or the eposidic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

The unique facts of this case clearly preclude it from being a vehicle to consider whether the actual malice test of *New York Times v. Sullivan*, Id., should apply to the evolving tort of intentional infliction of emotional distress. The facts show not just a one or two time incidence of verbal activity on the part of the petitioner, as was the case in *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir., 1978) and *Readers' Digest Association, Inc. v. Superior Court*, 690 P.2d 610 (1984) but a course of conduct over a three-year period of time directed toward the respondent. Police Captain Tim Daley testified that petitioner talked to him for over an hour on the phone during which he made many derogatory statements and further stated that he would cost the respondent his job at any cots. (T. 423-424) Captain Daley stated none of the complaints he knew of made by petitioner were found to be true. (T. 428) Police Lt. Albert Benafield testified that during a two to two-and one-half year period he had to single out the respondent on his daily worksheet to check on him because of complaints and that this constant checking caused the respondent problems emotionally. (T. 464-467) Lt. Benafield stated he knew of no wrongdoing on the part of respondent for over two years while the complaints were being made by the petitioner. (R.

487) Police Sgt. Watters testified that he was the supervisor of the respondent from 1978 through 1982; that he found no wrongdoing on the part of the respondent during that time even though he had to check on him repeatedly because of complaints made by the petitioner. (T. 499-507) Police Captain Ethridge testified that no other person besides petitioner made any complaints about the respondent's performance and that Captain Ethridge had to check on the respondent daily or weekly because of false complaints by the petitioner. (T. 523-530) A Miss Haston testified petitioner solicited her to call respondent's wife to make false claims that she was having an affair with respondent; (T. 622) that petitioner made a knowingly false statement to the Little Rock Police Department that respondent was harassing Miss Haston (T. 619); and that on numerous occasions, petitioner, while in her presence, would call to the police department making false claims about the respondent. The petitioner told Miss Haston he would spend every dime he ever made to get the respondent fired from his job and cause him as much misery as he could. (T. 621)

These facts show that the petitioner had not acted in good faith but with malice toward respondent. As this Court has pointed out, "neither lies nor false communication serve the ends of the First Amendment, and no one suggests their desirability or further proliferation." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

The " . . . protection of free speech would not protect a man from falsely shouting fire in a theater and causing a panic" and does not protect outrageous conduct such that was done by petitioner for over two and one-half years. *Shenck v. United States*, 249 U.S. 47, 52 (1919). This Court should not grant certiorari to review such outrageous conduct as was committed by the petitioner and should not use this case, under its unique fact situation, to determine if the actual malice test of *New York Times v. Sullivan* should be expanded to include a tort which already requires, by its

very terms, intentional or reckless conduct before liability attaches. The tort of intentional infliction of emotional distress encompasses actual malice as a necessary element that must be proved before recovery. Contrary to the petitioner's claim, there was more than ample evidence of actual malice since there was ample evidence of complaints being " . . . fabricated by the defendant" and being " . . . the product of his imagination". *St. Amant v. Thompson*, Id., 390 U.S. at 732.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT A. NEWCOMB, certify that a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI has been served on the attorney for petitioner, Kevin T. Baine, Stephen L. Urbanczyk, Robert W. Hamilton, 839 17th Street N.W., Washington, D.C. 20006, and Samuel A. Perroni, 1523 South Broadway, Little Rock, Arkansas 72202, by placing same in the United States Mail, this 8th day of January, 1986.

_____

ROBERT A. NEWCOMB